Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	CC Docket No. 96-115
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.

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Summary

Section 222 of the Telecommunications Act of 1996 creates a duty for telecommunications carriers to protect Customer Proprietary Network Information ("CPNI") and prohibits them from using CPNI in any of their marketing efforts. These CPNI provisions apply only to telecommunications carriers but apply to all telecommunications carriers and apply to any marketing activities, uses and disclosures where the CPNI arises from the customer-carrier relationship. "Telecommunications" and "telecommunications services" as used in Section 222 are explicitly defined in the Telecommunications Act, and there is no reason to interpret the Act differently. The definitions that Congress provided should be used in Section 222.

As a matter of policy, however, the Commission should apply Section 222 in harmony with the joint marketing restrictions of Section 271 that allow carriers that serve less than a five percent of the Nation's presubscribed lines to jointly market local and long distance offerings. Specifically, the Commission should forebear from applying the implicit marketing restrictions of Section 222 to carriers with less than five percent of the Nation's presubscribed lines.

MFS recommends that any customer authorization be written and that the Commission preempt any state notification rules that are inconsistent with the Commission's CPNI notification requirements.

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Implementation of the Telecommunications Act of 1996:	)	
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Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	CC Docket No. 96-115

COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel and pursuant to the Section 1.415 of the Commission's rules, submits these comments in response to the above captioned *Notice of Proposed Rulemaking* ("Notice").

I. INTRODUCTION AND SUMMARY

Section 222 of the Telecommunications Act of 1996[1/] creates a duty for telecommunications carriers to protect Customer Proprietary Network Information ("CPNI") and prohibits them from using CPNI in any of their marketing efforts. These

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1/ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) *codified at* 47 U.S.C. §§ 151 *et seq.*

CPNI provisions apply to only to telecommunications carriers but apply to all telecommunications carriers. "Telecommunications" and "telecommunications services" as used in Section 222 are explicitly defined in the Telecommunications Act, and there is no reason to interpret the Act differently. The definitions that Congress provided should be used in Section 222.

As a matter of policy, however, the Commission should apply Section 222 in harmony with the joint marketing restrictions of Section 271 that allow carriers that serve less than a five percent of the Nation's presubscribed lines to jointly market local and long distance offerings. Specifically, the Commission should forebear from applying the implicit marketing restrictions of Section 222 to carriers with less than five percent of the Nation's presubscribed lines.

MFS recommends that any customer authorization be written and that the Commission preempt any state notification rules that are inconsistent with the Commission's CPNI notification requirements.

II. CPNI PROVISIONS SHOULD APPLY TO TELECOMMUNICATIONS CARRIERS WITH EXCEPTIONS FOR SMALLER CARRIERS

The Section 222 CPNI provisions represent a significant change and greatly expand the Commission's existing CPNI requirements. Section 222 CPNI provisions create a duty for all telecommunications to protect proprietary information. They also restrict all telecommunications carriers from using CPNI in any of their marketing efforts unless the carriers have prior authorization from customers.

A. Telecommunications Service Should be Defined as Written in the Telecommunications Act

The Commission seeks comments on the definition of telecommunications services as it is applied in Section 222.[2/] The Telecommunications Act does not define telecommunications service by whether the call is interLATA or intraLATA as NYNEX suggests; nor, as the Commission concluded,[3/] does the Act define telecommunications by reference the Computer II distinction between "basic" and "enhanced" services; nor does the Act define telecommunications by whether the communications are local, interexchange or wireless.[4/] *Telecommunications service* is explicitly defined:

> The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.[5/]

Telecommunications is broadly defined:

> The term 'telecommunications' means the transmission between or among points specified by the user's choosing, without change in the form or content of the information as sent and received.[6/]

A key element in the definition of telecommunications is the transmission of information. The key element of the definition of a telecommunications service is whether a firm offers telecommunications (*i.e.*, transmission services) directly to the public for a fee. In

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2/ Notice at ¶¶ 17, 20-26.

3/ Notice at ¶20, note 55.

4/ Notice at ¶ 22.

5/ 47 U.S.C. § 153(46).

6/ 47 U.S.C. § 153(43) [emphasis added]

contrast, information service is not defined as the transmission of information but "offering a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[7/] The Telecommunications Act also defines some specific services provided by the Bell Operating Companies ("BOCs"), notably interLATA services [8/] and interLATA information services,[9/] as telecommunications that the BOCs may not provide except through a separate subsidiary or only after satisfying the Section 271 checklist.

MFS recommends that for purposes of applying the CPNI rules, telecommunications and telecommunications services should not be interpreted to mean some variation of local, interexchange, interLATA, intraLATA, basic or enhanced or commercial mobile radio services ("CMRS") service.[10/] Rather, telecommunications and telecommunications services should be defined simply as they are defined in the Telecommunications Act. Regardless of the legislative history and revisions to this section of the Telecommunications Act, Congress ultimately chose to use

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7/ 47 U.S.C. § 153(20).

8/ 47 U.S.C. § 153(21). "The term 'interLATA service' means telecommunications between a point located in a local access and transport area and a point located outside such area."

9/ Under 47 U.S.C. §272(a)(2)(C), a BOC may not provide interLATA information services (other than electronic publishing as defined by 47 U.S.C. § 274(h)(2)) except through a separate subsidiary. 47 U.S.C. §274(h)(2) defines electronic publishing to exclude the services that are traditionally thought of as Internet services, including gateway services, e-mail, navigational systems, etc. Thus, by defining what is excluded from electronic publishing, the Telecommunications Act defines interLATA information services.

10/ Notice at ¶¶ 22-25.

"telecommunications" and "telecommunications services" and "telecommunications carriers" in Section 222, both terms that it explicitly defined. By including such explicit definitions, it is reasonable to conclude that Congress intended that the Commission should use those definitions.

B. CPNI Provisions Apply Only to Telecommunications Carriers

Section 222(a) creates a duty of every telecommunications carrier to protect the confidentiality of proprietary information and Section 222(b) restricts telecommunications carriers from using CPNI that they receive from another telecommunications carrier for any marketing efforts. Section 222(c) prohibits a telecommunications carrier from using or disclosing any CPNI that it receives by virtue of its carrier-customer relationship unless it has approval from the customer. These restrictions are a much more expansive application of CPNI restrictions than applied under the Computer II and Computer III decisions, which previously applied only to the BOCs, GTE and AT&T, and applied only to the joint provision of enhanced and basic services and CPE.[11/] The CPNI provisions of Section 222 apply to all marketing activities that might spring from telecommunications service.

[11/] In ¶38 of the Notice, the Commission concludes that its existing Computer III requirements place greater restrictions on AT&T, the BOCs and GTE for the provision of enhanced services and CPE than do the CPNI requirements of the Telecommunications Act. The CPNI requirements restrict all carriers from using any CPNI information for its own marketing efforts (regardless of what is being marketed), so the CPNI requirements in the Telecommunications Act are more expansive and restrictive than the Computer III requirements.

As the Commission observed in its Notice,[12] the scope of services included in the definition of "telecommunications service" has a significant impact on several aspects of the CPNI provisions of the Telecommunications Act. Specifically,

- CPNI is defined as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a *telecommunications service* subscribed to by any customer."
- A telecommunications carrier that obtains CPNI "from another carrier for purposes of providing any *telecommunications service* shall use such information only for such purposes and shall not use such information for its own marketing efforts."[13]
- Except as provided by law or with the approval of the customer, telecommunications carriers may only "use, disclose, or permit access to individually identifiable customer proprietary network information" in their provision of the *telecommunications service* from which the information is derived or in their provision of services necessary for the provision of such *telecommunications service*, including publication of directories.[14]

12/ *Notice* at ¶¶ 20-26.

13/ 47 U.S.C. § 222 (b) [emphasis added].

14/ 47 U.S.C. § 222(c)(1)

- A telecommunications carrier that receives CPNI "by virtue of its provision of a *telecommunications service* may use, disclose, or permit access to aggregate customer information."[15/]
- A local exchange carrier may use, disclose, or permit access to aggregate customer information "only if it provides such aggregate information to other carriers on reasonable and nondiscriminatory terms and conditions."[16/]

By its terms, while Section 222 applies to all telecommunications carriers, it is important to note that it does not apply to non-carriers that obtain CPNI, although other privacy obligations (*e.g.*, state requirements) may arise. For example, since they provide information services, an enhanced service provider, or an Internet provider may capture the names, telephone numbers and traffic data from its customers and is not prohibited from using that information to market its services or even to market telecommunications services. Also, because aggregators[17/] are specifically excluded from the definition of telecommunications carriers,[18/] the CPNI and confidentiality duties do not apply to payphone providers, hotels, motels and other similar entities.

15/ 47 U.S.C. § 222(c)(3)

16/ 47 U.S.C. § 222(c)(3)

17/ 47 U.S.C. §226(a)(2) defines aggregators as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."

18/ 47 U.S.C. §153 (44).

CPNI includes only that information related to or arising from a customer's telecommunications service. Thus, for example, customer names and addresses of those who buy communications software, such as Procomm Plus, Netscape, or Microsoft's Internet Explorer are not considered CPNI as they are not revealed in the course of the provision of telecommunications service or "solely by virtue of the carrier-customer relationship."[19/]

C. CPNI Provisions Should be Interpreted in Harmony with the Joint Marketing Restrictions

The Telecommunications Act does not explicitly exclude any class of carriers from the CPNI provisions that restrict telecommunications carriers from using CPNI in their marketing efforts. However, as the Commission noted, there is some legislative history that suggests that the legislative intent was to recognize competitive factors,[20/] and certainly, the overarching legislative intent of the Telecommunications Act is to promote the development of competition. As the Commission points out, the legislative intent of the CPNI provisions of the Telecommunications Act is to prohibit "established providers of certain telecommunications services from gaining an advantage by using CPNI to facilitate their entry into new telecommunications services without obtaining prior customer authorization "[21/]

19/ 47 U.S.C. §222(f)(1)(A).

20/ Notice at ¶ 24, note 60.

21/ Id.

From a policy perspective, it is not sensible to restrict smaller, clearly non-dominant carriers from cross-marketing their services. Smaller carriers with a *de minimis* market share and serving a limited number of customers will not distort competition in the market by being able to jointly market their local, long distance and other services to their customer bases. Requiring new market entrants and smaller carriers to obtain prior written authorization from customers before using CPNI for marketing efforts is largely an empty exercise. New market entrants typically start with a very small, or no embedded base of customers. As they add customers, new entrants could obtain written authorization from customers that allows them to use CPNI for marketing purposes. Smaller carriers, such as a rural telecommunications carrier or a small long distance provider, typically know their customers and their customers' telecommunications needs without needing to resort to CPNI. Said differently, requiring written authorization is meaningful only for larger incumbent providers who have a significant embedded base of customers.

Congress recognized this when it adopted the joint marketing restrictions of Section 271(e)(1). Under this section, a carrier that serves more than five percent of the Nation's presubscribed access lines may not jointly market resold local telephone service with interLATA long distance services. Thus, carriers with less than five percent of the Nation's presubscribed access lines may jointly market resold local services and long distance services. Reasonable interpretations of this provision are that: (1) Congress recognized that smaller carriers cannot distort competition through the joint

marketing of their services; or, (2) Congress intended to promote market entry and competition by allowing smaller carriers to jointly market their services.

The purpose of Section 271(e)(1) -- that smaller carriers be allowed to jointly market local and long distance offerings -- is somewhat frustrated by a CPNI requirement that restricts all carriers from using CPNI to cross-market to customers. The intent of Section 271(e)(1) can be fulfilled if the Commission forebears from strictly applying the CPNI requirements to smaller carriers. MFS suggests that the Commission use the same market share test as contained in Section 271(e)(1). That is, in order to avoid frustrating the operation of Section 271(e)(1), the Commission should allow carriers that service less than five percent of the Nation's presubscribed lines or access lines to use CPNI to cross-market to customers. MFS suggests that since most local exchange carriers do not have presubscribed lines, that access lines be used as a crude surrogate. This test would allow most smaller, rural local exchange carriers, small long distance providers, most CMRS providers, and most competitive local exchange carriers to jointly market their services, but would apply the CPNI restrictions to the larger local and long distance telephone companies where the competitive risks of joint marketing are obviously higher.

III. A NATIONAL POLICY REQUIRING WRITTEN CPNI NOTIFICATION SHOULD BE ESTABLISHED

A. The Commission Should Establish National CPNI Policies

The Commission seeks comment on whether the CPNI rules should preempt state regulation.[22/] MFS recommends that the Commission establish national CPNI rules that preempt state regulation, just as it preempted state CPNI rules that required prior authorization inconsistent with the Commission's rules. Just as with the prior CPNI rules, inconsistent state notification rules (*e.g.*, a state requirement that carriers need not produce written authorization when the Commission requires written notification) can obviously frustrate the implementation of federal policies.

B. Customer Notification of CPNI Rights Should be Written

The Commission seeks comment on the details of customer notification of CPNI rights.[23/] MFS recommends that the Commission require advance written notification of customers' CPNI rights. Written notice is the only reliable mechanism to ensure that carriers do, in fact, provide unambiguous notice to customers of their CPNI rights. The Commission should continue to apply its Computer III CPNI rules that require carriers to provide written notice to multi-line business customers of their CPNI rights.

MFS believes that carriers can obtain written authorization from customers as part of a fulfillment package for new customers. That is, as customers change carriers,

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22/ Notice at ¶¶ 16-18.

23/ Notice at ¶¶ 26-33.

they should be provided with written information about their CPNI rights and explicitly provided with the opportunity to waive those rights. Incumbent carriers will certainly complain that such a requirement disadvantages them as it requires them to distribute waiver forms to their embedded base of millions of customers whereas new entrants can present waivers to customers at the time they sign up for service. However, the so-called disadvantage of the incumbents should be weighed against the disadvantage facing new entrants. Incumbents are defending a base of embedded customers (often close to 100% of customers in a market) gained after decades of government protection from competition whereas new entrants must build their networks, develop a market reputation and convince customers to switch in a competitive environment. Requiring a written waiver from customers is hardly a disproportionate burden.

IV. CONCLUSION

For the foregoing reasons, the Commission's rules implementing Section 222 should incorporate the provisions discussed in these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June 1996, copies of the foregoing COMMENTS OF MFS COMMUNICATIONS COMPANY, INC. in CC Dockt 96-115, were served, via Messenger, to all parties below:

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